

July 21, 1989

REPORT TO THE CHAIR AND MEMBERS OF THE REDEVELOPMENT AGENCY
OF THE CITY OF SAN DIEGO
PROPOSED NEGOTIATION AGREEMENT WITH KOLL COMPANY-DAVIDSON
COMMUNITIES, INC. FOR DEVELOPMENT OF PARCEL C-5 WITHIN THE
COLUMBIA REDEVELOPMENT PROJECT AREA
SUMMARY

Pursuant to your request, this report sets forth our views concerning certain aspects of the development of Parcel C-5 (the "Site") in the Columbia Redevelopment Project Area. On August 5, 1989 the Centre City Development Corporation ("CCDC") issued a Request for Proposals ("RFP") for hotel/residential development of the Site. A copy of the RFP and three addenda thereto are attached as Enclosure (1).

Three proposals were received by CCDC and on May 26, 1989 its Board of Directors voted to recommend approval of a proposal by Koll Company-Davidson Communities to the Redevelopment Agency (the "Agency") for further negotiation potentially leading to a Disposition and Development Agreement. The item was scheduled to be heard by the Agency on June 6, 1989.

On June 2, Sandor Shapery, a representative of one of the competing proposers, City Suites of America (First Integrity Hotel Corporation), raised issues concerning the legality and propriety of the Koll Company-Davidson Communities' proposal.

On June 6, at the request of legal counsel for Mr. Shapery, the item was continued to July 11, 1989 to allow us time to respond to Mr. Shapery's questions and we subsequently asked for additional time to respond. The matter is now set for your consideration on July 25, 1989.

In substance, the legal issues raised by Mr. Shapery are as follows:

1. That a Floor Area Ratio ("FAR") on the Site which would permit a total of 600,000 square feet of construction above grade violates provisions of the San Diego Municipal Code; and
2. That the Fourth Amendment to the Columbia Redevelopment Plan, as construed by CCDC, favors the Koll Company-Davidson Communities' proposal to the exclusion of other developers proposing to develop the Site and violates Mr. Shapery's constitutional guarantees of equal protection

under the law.

Mr. Shapery also contends:

1. That at the time the Fourth Amendment to the Columbia Redevelopment Plan was adopted (and the FAR increased from 5.0 to 9.0 on certain south of Broadway properties), it was never intended to provide for a 600,000 square foot, 38-story building on a 33,321 square foot parcel which would have a FAR of 20.0.; and

2. That the Koll Company-Davidson Communities' proposal is contrary to the intent of the Centre City Community Plan, the Centre City Urban Design Program and numerous provisions of the Columbia Redevelopment Plan.

We do not believe the last two contentions raise legal issues and do not propose to address them in this report. However, each of the two legal issues raised by Mr. Shapery shall be discussed by this report. Prior to our discussion on these issues some background information may be helpful.

BACKGROUND

The site is 30,000 plus square foot parcel on the southwest corner of Broadway and State Street within the Columbia Redevelopment Project Area, development of which is governed by the Columbia Redevelopment Plan.

Previously, the Redevelopment Agency entered into a Disposition and Development Agreement with Koll Company-Columbia Development ("Koll-Columbia") for development south of Broadway on a substantial portion of Parcel C. Originally, the "Master Plan" (a portion of the contractual arrangement between the

Agency and Koll-Columbia) contemplated a 16-story hotel on this particular site. The allowable FAR at that time was 5.0.

On June 30, 1986, the Fourth Amendment to the Columbia Redevelopment Plan (the "Fourth Amendment") was adopted by the Agency. This Fourth Amendment, still in effect, states in Section 500.7 in pertinent part:

Notwithstanding the Floor Area Ratios set forth in this Section 500.7, the land within the Project area located generally south of Broadway between Kettner Boulevard and State Street and shown more particularly on the map attached hereto as Exhibit IV may be developed with structures with an overall Floor Area Ratio of 9.0. The Agency may transfer a portion of the floor area permitted under this Redevelopment Plan on the respective properties, between the affected area

described above and immediately contiguous property, if developed in common ownership and/or control and pursuant to a common plan approved by the Agency.

A copy of Exhibit IV to which the Fourth Amendment alludes is attached hereto as Enclosure (2).

The primary reason for this amendment was explained in a Report to City Council on the Proposed Fourth Amendment to the Redevelopment Plan for the Columbia Redevelopment Project, prepared by the Agency in February, 1986. At page 2 the report states, "In order to provide for mixed use development including hotel, office, retail, housing and parking on the affected area at a scale which compliments the development of Centre City and to enhance Broadway as the City's principal street, a higher Floor Area Ratio is required."

On August 12, 1986, the Agency approved the schematic drawings for the Koll-Columbia project.

On February 5, 1987, the Agency entered into a Disposition and Development Agreement with Emerald-Shapery for a mixed-use development across the street from Parcel C on the north side of Broadway.

On January 15, 1988, the Agency and Koll-Columbia mutually terminated their agreement to develop this particular site

(Parcel C-5) with construction to continue as generally contemplated on Parcels C-3, 4, 6 and 7.

On August 5, 1988, CCDC issued a Request For Proposal ("RFP") for development of the site in question. The RFP called for a FAR of 9.0 on the 33,321 square foot parcel.

On November 18, 1988, an Addendum to the RFP was issued which substituted a total square footage above grade criterion not exceeding 600,000 square feet for a FAR of 9.0 and the deadline date for receipt of proposals was extended to February 15, 1989.

Three proposals were received for development of the site. The proposers were Koll Company-Davidson Communities, City Suites of America (First Integrity Hotel Corporation), and 900 State Street Corporation (El Dorado Asset Management, Inc.). The Koll-Davidson proposal differed from the others in that it proposes development with a FAR of approximately 20.0.

On May 26, 1989, CCDC's Board of Directors approved the Koll-Davidson Communities proposal by a 4 to 3 vote; and recommended that proposal to the Agency for its consideration.

LEGAL ISSUE 1

That a Floor Area Ratio on the Site which would permit a total of 600,000 square feet of construction above grade,

violates provisions of the San Diego Municipal Code.

ANSWER

There is no violation of the San Diego Municipal Code by establishing a Floor Area Ratio on the Site which permits a total of 600,000 square feet of construction above grade.

Section 500.7 of the Columbia Redevelopment Plan deals with FARs in the Project area. As stated previously, the FAR for the Columbia Redevelopment Project is 5.0 with the exception of the area south of Broadway between Kettner and State which was the subject of the Fourth Amendment.

Section 500.7 provides that any FAR should be computed in accordance with a formula set out in San Diego Municipal Code section 101.0101.21. In pertinent part, that Code section defines Floor Area Ratio as: "The numerical value obtained by dividing the gross floor area of a building or buildings on the premises by the total area of the premises within the zone on

which such building or buildings are located." (Emphasis supplied.)

"Premises" as used above is then defined by San Diego Municipal Code section 101.0101.40 as "portion area of land with its appurtenances and buildings which because of its unity of use may be regarded as the smallest conveyable unit." (Emphasis supplied.)

Thus, Section 101.0101.21 simply sets out how the FAR is calculated and Section 101.0101.40 simply defines the unit of land upon which the FAR will be calculated. It seems abundantly clear to us that the controlling phrase here is "land . . . which because of its unity of use may be regarded as the smallest conveyable unit."

In his written remarks to us Mr. Shapery contended that Section 101.0101.40 requires that the premises be owned by one party and this definition and the formula in Section 101.0101.21 preclude any transfer of FARs. At a subsequent meeting with us on July 13, 1989 at his request, he further argued that Exhibit IV to the Plan clearly shows the intent of the transfer concept embodied in the Fourth Amendment to the Plan contemplated a transfer between all of Parcel C (Exhibit IV) lined property and "immediately contiguous property" (i.e., the parcels to the west of Parcel C) and that the proposal under consideration fails to comply with those requirements because the Site was and still is an integral part of the affected property (Parcel C) in the first instance.

This may be true, but that argument misses the mark if it is considered to be controlling on this entire issue.

We still need to consider the effect, if any, of the first sentence of the Fourth Amendment which provides that any of the land within the Project Area located generally south of Broadway between Kettner Boulevard and State Street (clearly including the present Site, C-5) may be developed with structures with an overall Floor Area Ratio of 9.0. One can read that sentence to mean that so long as the Municipal Code definition of "premises" can be met, the utilization of any remaining portion of an overall 9.0 FAR may be utilized on the Site in question. The staff of CCDC advises us that this is indeed the case and contends that the reason that Parcel C-5 can be developed to this 600,000 sq. ft. density is because the current development by Koll-Columbia of other portions of the area affected by the Fourth Amendment have underutilized some portion of the overall

9.0 FAR; and that the development of this remaining portion of Parcel C can utilize this FAR under the "overall Floor Area Ratio of 9.0" concept.

CCDC staff further advises us that this Site, Parcel C-5, is now subdivided and meets the Municipal Code "premises" criterion.

We believe these CCDC staff contentions to be sound and support them. While the language in question in the Fourth Amendment may not be a model of pristine clarity and conciseness it is certainly subject to the interpretation contended by CCDC staff and while we were not consulted with respect to this interpretation prior to the issuance of the addendum to the RFP last November, we believe that it is a legally defensible interpretation and so advise.

LEGAL ISSUE 2

The Fourth Amendment to the Columbia Redevelopment Plan, as interpreted by CCDC in the RFP, favors the Koll Company-Davidson Communities' proposal to the exclusion of other developers wishing to develop the site and thus violates Shapery's constitutional guarantees of equal protection.

ANSWER

The Fourth Amendment to the Columbia Redevelopment Plan as interpreted by CCDC in the RFP does not favor Koll Company-Davidson Communities to the exclusion of other developers wishing to develop the site and is not violative of constitutional guarantees.

DISCUSSION

The Fourth Amendment to the Columbia Redevelopment Plan approved in June of 1986 clearly did not contemplate the situation before the Agency today. At the time it was approved, the site in question was still part of the original Koll-Columbia

Development.

However, the Fourth Amendment continued to apply to the site in question following the mutual termination of the development agreement concerning it on January 15, 1988. Any developer responding to the 1988 RFP would have the ability to use the Fourth Amendment to its advantage as it could develop the site and utilize the unused FAR under the Fourth Amendment's provisions. Any developer would also have the option to develop a project utilizing the FAR at a strict ratio of 9.0.

The initial RFP called for a FAR of 9.0 while indicating in several places the need to develop a project which complimented the Koll-Columbia development. Page 3 of the RFP indicated that the selected developer would be required to build a parking garage for Columbia Tower (the senior housing component of the Koll-Columbia development). It went on to say that the "Agency will recognize such costs in negotiating the financial terms of this development opportunity." The RFP notified all potential developers of the opportunities and constraints on the development but nowhere did it appear to favor any particular developer. When amended in November, the RFP merely permitted what was already allowed by the Fourth Amendment; the overall utilization of the FAR remaining from the development of the other portions of Parcel C as a whole (Enclosure (2)).

To violate equal protection guarantees, it must be clearly shown that a separate classification has been created which, without further justification, is being treated differently. We fail to see any factual support for this contention as there is no separate classification created.

OTHER ISSUES

Finally, Mr. Shapery raises questions of the "intent" of the Fourth Amendment to the Columbia Redevelopment Plan; the Centre City Community Plan and the Urban Design Program as they may relate to the Koll-Davidson proposal. Quite frankly, we see no legal issues raised by these contentions and believe they raise policy questions best addressed by the Agency members in your deliberations on this proposal.

Respectfully submitted,

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City Attorney

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Attachments

RC-89-24